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ABSTRACT

The document identifies the legal issues arising from the Education for All Handicapped Children Act (P.L. 94-142) and Section 504 of the Rehabilitation Act of 1973, and indicates how the courts are handling these issues. Annotations on court cases are arranged in major categories: free appropriate public education, placement in the least restrictive environment, placement at no cost to the parent, due process procedures, discipline/expulsion, exhaustion of administrative remedies, miscellaneous cases decided under P.L. 94-142 or Section 504, cases that pose future P.L. 94-142 and Section 504 issues, and cases to note. Within each category the cases are listed chronologically with the most recent case first. (Author/SBH)

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Education of the Handicapped Litigation

Brought Under

P.L. 94-142 and Section 504

Compiled by

Sharon A. Kowal

September 1, 1978

Lisa Walker, Coordinator EHPP

EC112513

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"Education of the Handicapped Litigation Brought Under P.L. 94-142 and Section 504" was compiled by Sharon A. Kowal under the auspices of the Education of the Handicapped Policy Project of the Institute for Educational Leadership. The Education of the Handicapped Policy Project (EHPP) is supported by funds from the Bureau of Education for the Handicapped, USOE. During the summer of 1978 Ms. Kowal has worked as a legal intern for Lisa Walker, the coordinator of EHPP. Ms. Kowal is now in her second year of law school at the National Law Center of the George Washington University.

This compilation is intended to be a general resource document. We request any clarification, corrections, updates or additions to this compilation be sent to: EHPP, 1001 Connecticut Ave. N.W., Suite 310, Washington, D.C. 20036, (202) 833-1727

"Education of the Handicapped Litigation Brought Under P.L. 94-142 and Section 504" was compiled to provide quick reference to cases concerning the education of the handicapped. An attempt has been made to make this compilation as complete and up-to-date as possible as of August 1, 1978.

This compilation is intended to identify the legal issues that have arisen to date out of the Education of All Handicapped Children's Act of 1975 (P.L. 94-142) and section 504 of the Rehabilitation Act of 1973 and to indicate how the courts are handling these issues. Many of the included cases, however, are not limited to education of the handicapped issues and many have been brought under state and/or Constitutional law. These questions were not the concern of this compilation but their presence is usually indicated by the phrase inter alia. It is emphasized that the annotations are intended merely to provide the reader with the flavor of each case and that the court record rather than these annotations should be relied upon for any further research.

The cases are arranged in major categories: free appropriate public education, placement in the least restrictive environment, placement at no cost to the parent, due process procedures, discipline/expulsion, exhaustion of administrative remedies, miscellaneous cases decided under P.L. 94-142 or Section 504, cases that pose future P.L. 94-142 and Section 504 issues, and cases to note. Cases included in the "cases to note" category may or may not have an impact on elementary and secondary education of the handicapped and are mainly for the reader's interest. The other categories should be self explanatory.

Within each category the cases are listed chronologically with the most recent case first. Although each case is listed only once many of them could properly fall under more than one category. For our purposes, however, this compilation places a cases according to its predominant issue.

Sharon A. Kowal
September 1, 1978

EDUCATION OF THE HANDICAPPED LITIGATION

Free Appropriate Public Education

North Carolina Association for Retarded Citizens v. State of North Carolina Board of Public Education, CA No. 3050 (E.D.N.C., July 1978)

The plaintiffs in this class action are residents of four mental retardation centers in North Carolina. The plaintiffs alleged that they were denied access to free public education by the defendant due to their retardation. In July 1978 the parties entered into a consent agreement where they agreed that retarded persons of school age in North Carolina are entitled to free appropriate education in accordance with the provisions of P.L. 94-142 and section 504 of the Rehabilitation Act of 1973 and the implementing regulations.

Defendants have agreed to locate all mentally retarded children in need of free appropriate public education and have agreed to conduct a public informational program to increase awareness of the right of the handicapped to an education. The judgment also concerns compensatory education and the establishment of a panel to moniter the implementation of the agreement. Finally, NCARC is to set up a Citizens Advocacy Program to train individuals to be resource people to assist in the implementation of free appropriate education.

This consent agreement only settles the "right to education" issues. Issues concerning treatment and sterilization are still pending.

Lora v. New York Board of Education, ___F. Supp.___, 46 USLW 2683 (E.D.N.Y., June 2, 1978)

Lora challenged the disproportionate placement of minority students classified as emotionally disturbed in special segregated public day schools. The plaintiffs alleged that this placement without adequate prior notice or an opportunity to be heard denied them an appropriate education and violated their rights under P.L. 94-142, the Rehabilitation Act of 1973, state laws and the Constitution.

The Court relied on the equal protection clause of the Constitution to find that the plaintiffs are entitled to adequate treatment including adequate diagnosis and classification procedures as well as satisfactorily equipped and staffed special day schools. The Court noted that the federal and state statutes "are designed to guarantee at least a minimum education for all handicapped pupils and to assure against any possibility of racial or cultural discrimination." Accordingly the plaintiffs are entitled to an appropriate education, due process hearings with the necessary procedural safeguards and periodic reassessment of the appropriateness of the placement. The Court, however, was unwilling to find a violation of equal protection guarantees in the absence of a finding of intent to discriminate. The plaintiffs would have to show more than mere disproportionate impact along racial lines to prove discrimination.

Campochiaro v. Califano, No. H78-64 (D.Conn., May 18, 1978)

The plaintiff, a diagnosed learning disabled child, alleges that he has been denied a free appropriate education and due process hearing that he is entitled to under P.L. 94-142. The LEA, upon finding the plaintiff handicapped, recommended that he be placed in a private day care facility. The plaintiff's parents objected to this placement and demanded a hearing which the LEA denied. The plaintiff then sought an injunction prohibiting HEW from issuing funds under P.L. 94-142 to Connecticut. The plaintiff also sought proper placement and damages. The Court ordered the State Board of Education to set up an impartial hearing panel with procedural safeguards to determine the proper educational placement for the plaintiff. The Court also ruled that an individual does not have standing to seek an injunction to stop P.L. 94-142 funds and denied the plaintiff's motion.

Doe v. Grile, Civ. No. F77-108 (N.D.Ind., 1978)

113 severely retarded children allege that the state has failed to provide appropriate educational services under P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973. It is alleged that the number of special education teachers provided and the level of resources for their use is not adequate to meet the special education needs of the plaintiffs. On April 24, 1978 all claims based on P.L. 94-142 were dismissed on the basis that there could be no cause of action under P.L. 94-142 until September 1, 1978. On May 18, 1978 the plaintiffs' motion for a preliminary injunction was denied. Grile is currently pending trial on the merits.

For further information contact Ernie Beal, 7307 Ridge Knoll Dr., Fort Wayne, Indiana 46804

Stephen L. v. Indiana State Board of Special Education Appeals, No. F78-6 (N.D. Ind., July 7, 1978)

The plaintiff alleges that his rights have been violated under P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973. The complaint alleges that the defendants have failed to establish an adequate identification process and have denied special education and placement to the plaintiff and others similarly situated. The Court denied the defendants' motion to dismiss without prejudice and is awaiting evidence from both parties to determine whether administrative remedies have been substantially exhausted. The Court has apparently changed its mind from Doe v. Grile, supra, and decided that some procedures under P.L. 94-142 are presently enforceable.

Armstrong v. Kline, No. 78-172 (E.D.Pa., filed March 17, 1978)

The plaintiff alleges that the state should provide a twelve month education program because that is the appropriate program for the plaintiff and others similarly situated. The plaintiff also alleges that he has a right to a hearing to prove the need of the twelve month program. The plaintiff bases his complaint on P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973, inter alia. The defendant maintains that the public school is not mandated to provide a summer program, nor is it required to reimburse a parent for the cost of a summer program. The defendant has agreed to stipulations to provide summer programs for the named plaintiffs this summer (1978). A pre-trial

conference was scheduled for August 3, 1978 and the case is expected to come to trial in late September.

For further information contact Education Law Center, 2100 Lewis Tower Building, 225 South 15th St., Philadelphia, Pennsylvania 19102 (215) 732-6655

P-1 v. Shedd, No. 78-58 (D.Conn., filed February 27, 1978)

The plaintiffs are in the Hartford School System and allege that their rights have been violated under P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973, inter alia. The plaintiffs allege that they have either not been placed or have been placed in inappropriate education programs, that the defendants have failed to write individualized educational programs or have written them improperly, and that the defendants have failed to adopt appropriate language for discipline procedures for special education students. There are nine named plaintiffs and although it has been moved and argued that it be a class action it has yet to be certified as such. The plaintiffs have begun argument for a preliminary injunction through which they seek proper educational placement for the named plaintiffs and others similarly situated. After one day of trial the Judge postponed it until September 1978. The defendant has moved to dismiss the complaint and the motion is still pending.

For further information contact Paula Cosgrove, Legal Services, 161 Washington Street, Hartford, Connecticut 06106 (203) 278-6020

Saunders v. Prince Georges County Board of Education, No. 77-1882 (D.Md., filed November 11, 1977)

The plaintifff is an hydrocephalic, non-ambulatory, blind, mentally retarded minor. The Maryland Board of Education ruled that the defendant need not provide the plaintiff with an education program due to the severity of her disabilities. The plaintiff alleged that this decision violated her rights under P.L. 94-142. Within thirty days after this suit was filed the plaintiff received appropriate educational placement and the action was dismissed.

Mattie T. v. Holladay, No. D.C. 75-31-S (N.D.Miss., July 28, 1977)

The plaintiffs moved for summary judgment against officials of the Mississippi Department of Education holding that the defendants had failed to adopt sufficient policies and procedures to ensure the plaintiffs' procedural safeguards, such as notice and hearing, programs to locate and identify children in need of special education, racially and culturally nondiscriminatory tests and procedures, and education programs for the handicapped with the non-handicapped to the maximum extent appropriate. The plaintiffs also moved for summary judgment against officials of the LEA for failure to provide necessary educational services to the plaintiffs.

On July 28, 1977 the Court granted the plaintiffs' motion for summary judgment against the state defendants and issued an unpublished order which required the state defendants to develop a state plan in compliance with P.L. 94-142. This compliance plan is currently under discussion. The Court also granted the motions for summary judgment against the LEA defendants and held that the individual child has a substantive right to appropriate education under section 504 of the Rehabilitation Act of 1973.

For further information on Mattie T. contact Children's Defense Fund, 1520 New Hampshire Avenue N.W., Washington, D.C. 20036 (202) 483-1470

Michigan Association for Retarded Citizens v. Traverse Bay Area Intermediate School District, CC No. 77-5812-C-Z (Mich., Grand Tranverse County Circuit Court, filed July 28, 1977)

This is a class action that alleges that the defendant has failed to provide individualized special education for pre-school children up to age six in violation of P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973, inter alia. It is alleged that the defendant's state mandated special education plan is directed toward chronological age groups rather than individualized needs of the students.

Currently this action is before the Michigan Court of Appeals contesting procedural rulings made by the lower court judge. In the meantime, the defendant has revamped its pre-school program and is now doing individual assessments. The defendant's apparent compliance with the law raises the issue of mootness which may lead to dismissal of this action in the near future.

For further information contact William Campbell, Michigan Protection and Advocacy Service, 230 N. Washington Sq., Suite 200, Lansing, Michigan 48933 (517) 487-1755

Connecticut Association for Retarded Citizens v. State Board of Education, H77-122 (D.Conn., filed March 10, 1977)

A Connecticut statute relieved the public school of the obligation to provide education to mentally retarded children who 1) cannot take care of their personal hygiene; or 2) are not responsive to directions; or 3) have no means of intelligible communication. The plaintiffs allege that this violates P.L. 94-142 because plaintiffs are denied an opportunity for a program of public education and Section 504 of the Rehabilitation Act of 1973 because the statute discriminated solely on the basis of the handicap. As a result of this case that portion of the statute challenged was changed so that all mentally retarded children are entitled to an education. Currently the parties are working on a consent agreement.

For further information contact Howard Klebanoff or Holly Brooks, 664 Farmington Avenue, Hartford Connecticut 06105 (203) 549-6400

Harris v. Keane, No. 76-323 (D.V.I., 1976)

This class action challenges the exclusion of handicapped children from schools in St. Croix, Virgin Islands. The complaint is based on P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973, inter alia. The defendants have been ordered to "devise and prepare for immediate implementation of a special education program designed to satisfy the requirements of the St. Croix population as a whole." The plaintiffs were granted no immediate relief because the Court felt more harm would be done if inadequate educational programs were provided than no programs at all. The parties are currently negotiating to end litigation.

For further information on Harris contact Attorney General's Office, Department of Law, Government of the Virgin Islands, P.O. Box 280, St. Thomas, Virgin Islands

Placement in the Least Restrictive Environment

Egan v. School Administrative District 57, No. CV-77-283 SD (D.Me., filed February 13, 1978)

The plaintiff is an EMR student. The LEA determined that the plaintiff should be educated in a school for the handicapped where there is no interaction with non-handicapped children. The plaintiff alleges that this placement denies her rights under P.L. 94-142 to be educated to the maximum extent appropriate with non-handicapped children.

Barbara C. v. Moritz, C2-77-887 (Eastern Division Southern District Ohio, filed November 17, 1977)

The named plaintiffs seek to be certified as a class and are bringing this action to end the "arbitrary deprivation of civil rights of 2000 individuals on the rolls of Orient State Institute in Ohio." The plaintiffs seek an injunction ordering the defendants to provide full and appropriate educational services for school age residents of Orient, inter alia. They base this part of the complaint on P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973. The complaint alleges that although the Department of Education receives P.L. 94-142 funds none of this money is used for residents of Orient. It is also alleged that the plaintiffs are not educated to the maximum extent possible with non-handicapped individuals, nor are any steps taken to insure that the residents will receive educational services once placed back in the community.

A key issue to note in Barbara C. is the provision of compensatory education to adults who have received no education due to their residency since childhood at Orient.

For further information contact Douglas Rogers, Ohio Legal Rights Services, 8 East Long Street, Columbus, Ohio 43215 (614) 466-7264

Pickett v. Prince Georges County Board of Education, No. 77-1883 (D.Md., filed November 11, 1977)

The plaintiff is mentally retarded and was receiving only three hours of weekly home instruction. The Maryland Department of Education ruled that the plaintiff was entitled to non-public placement and that a residential facility was to make a daily program available to the plaintiff while they wait for bed space. The plaintiff contended that this decision violated P.L. 94-142 by failing to make a free public education program available. Within thirty days after the action was filed the plaintiff received appropriate educational placement and the action was dismissed.

New Jersey Association for Retarded Citizens v. New Jersey Department of Human Resources, No. C-2473-76 (filed March 16,1977)

This suit alleges that the education and training programs at Hunterdon

State School are inadequate and violate P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973, inter alia. The plaintiffs seek an order for the state to provide less restrictive educational alternatives than institutionalization and meaningful IEP's and to encourage more parent participation. On July 7, 1978 the trial was postponed for three months over the objections of the plaintiffs. The state asserted that it is making substantial changes and the court is allowing time for thoses changes to take effect. It has been indicated, however, that these changes relate to direct care services rather than the provision of adequate educational programs.

For further information contact Education Law Center, Suite 800, 605 Broad Street, Newark, New Jersey 07102 (201) 624-1815

California Association for Retarded Citizens v. Riles, No. 77-0341 (N.D.Cal., filed February 15, 1977)

This state-wide class action alleges that the state is illegally segregating handicapped children from non-handicapped children and that where handicapped children have been placed in the regular classroom the state has failed to provide adequate related services. The complaint is based on P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973, inter alia. The named plaintiffs have received proper placement and the state has developed at least on paper the sought after due process procedures. The sole issue that remains to be litigated is the state's duty to develop a monitoring process to insure that students are placed in the least restrictive environment. Currently motions for summary judgment are pending.

For further information contact Terry Friedman, Western Center on Law and Poverty, 3535 West 6th Street, Los Angeles, California 90020 (213) 487-7211

Halderman v. Pennhurst, 446 F. Supp. 1295 (1977)

The parents of the plaintiffs filed this class action alleging, inter alia, that the defendant state school and hospital violated their children's rights under Section 504 of the Rehabilitation Act of 1973 by isolating them from the rest of society and by denying them minimally adequate habilitation which includes appropriate education. The Court agreed with the plaintiffs and ordered the defendants to provide the least restrictive community living arrangement to the retarded residents of Pennhurst together with those services necessary to provide them with minimally adequate habilitation. Currently a court appointed master is helping with implementation of procedures to move the residents to the least restrictive environment. The defendants are appealing the decision to the third circuit Court of Appeals. It should be noted that the plaintiff class includes both children and adult residents at Pennhurst.

Michigan Association for Retarded Citizens v. Genesee Intermediate School District, No. 40912 (filed August 30, 1976)

This action alleged that the defendant was not providing any education to residents of school age at a nursing home located within the LEA. The complaint was based in part on Section 504 of the Rehabilitation Act of 1973. A preliminary injunction was issued which resulted in the transportation of capable residents to the public schools and homebound instruction for those residents who either could not benefit from public school education or who could not be transported.

Trial is scheduled for October 1978. The sole issue for trial is the provision of educational space to those residents who are receiving their education at the nursing home. Currently the residents are being taught in common living areas. The defendants claim, however, that they will be in compliance with the state law that entitles every child to educational space before the fall trial.

For further information contact William Campbell, Michigan Protection and Advocacy Service, 230 N. Washington Sq., Suite 200, Lansing, Michigan 48933 (517) 487-1755

Hairston v. Drosick, 423 F. Supp. 180 (1976)

The plaintiff suffers from spina bifida which caused incontinence of the bowels and a noticeable limp but did not impair her mental capabilities to profit from the regular classroom setting. The Court held that a school could not legally condition the child's placement in the classroom on the parent's presence there, the exclusion of a minimally handicapped child from the regular classroom without a bona fide educational reason violates section 504 of the Rehabilitation Act of 1973, and and exclusion of a child from the classroom without procedural safeguards is a denial of due process. The decision makes reference to P.L. 94-142 but does not rely on the Act for its ruling.

Placement at No Cost to the Parents

Jaworski v. Pawtucket School Committee, CA 78-0202 (D.R.I., filed April 27, 1978)

The plaintiff is handicapped by dyslexia, a specific learning disability under P.L. 94-142. It is alleged that the defendant has failed to identify the plaintiff as handicapped and consequently has failed to provide him with the special education and related services he requires.

In 1974 the plaintiff's parents placed him in an appropriate educational facility. In May 1975 the plaintiff's parents filed a petition with the defendant seeking relief for the cost of his educational placement. Two years later the defendant offered as relief to structure a program suitable to the plaintiff's needs but his parents disagreed and requested a hearing. It is alleged that a due process hearing was never afforded the plaintiff although they did appeal the original decision of the defendant to the Rhode Island Commissioner of Education and then the Board of Regents (SEA). All decisions were adverse to the plaintiff and the process took three years to complete. The plaintiff seeks to have his education funded by the LEA and bases his complaint on P.L. 94-142.

For further information contact George M. Prescot, Oster, Groff & Prescot, 936 Smithfield Ave., Lincoln, Rhode Island 02865 (401) 724-2400

Le Clerc v. Thompson, (D.N.H., filed February 13, 1978)

The plaintiffs, seeking to be certified as a class, have had their handicaps diagnosed by their respective LEA's and have received private placement as a result of these evaluations. It is alleged that the LEA's will only provide partial funding for these placements and that the state

refuses to provide any financial support. The plaintiffs allege that this partial funding denies them a free appropriate education and violates section 504 of the Rehabilitation Act of 1973, inter alia. The plaintiffs seek an order to temporarily enjoin the LEA's and the state from refusing to pay excess tuition where required, and an order that the defendants provide appropriate education at no cost to the plaintiffs.

For further information contact Manus & Johnson, 53 Old Rochester Rd., Dover, New Hampshire 03620

Oster v. Boyer, CA 77-0348 (D.R.I., filed June 6, 1977)

The plaintiff, a seriously emotionally disturbed child, alleges that she has been denied a free appropriate education by virtue of having been labeled seriously emotionally disturbed. The LEA has decided that the Department of Mental Health, Retardation, and Hospitals (MHRH) is responsible for her education under state law. MHRH has provided educational programs for the plaintiff but has required her parents to contribute a considerable sum for these programs. It is also alleged that the state plans that have been approved by BEH have represented that all handicapped children within the state are receiving a free appropriate education. The plaintiff seeks free appropriate placement and a ruling that the state law which allows the LEA to relinquish responsibility for the plaintiff's education is in violation and contrary to the Education for All Handicapped Children Act of 1975. The plaintiff also

For further information contact George M. Prescot, Oster, Groff & Prescot, 936 Smithfield Ave., Lincoln, Rhode Island 02865 (401) 724-2400

Oster v. Bevilacqua, CA 76-0206 (D.R.I., filed June 9, 1976)

The plaintiff and the facts are the same as in Oster v. Boyer. The defendant is the director of MHRH. The plaintiff is trying another tack to get the Rhode Island law in question ruled in violation of P.L. 94-142. In this action the plaintiff alleges that the funding scheme as a whole and the ad hoc method used by the defendant to determine how much the parents must contribute to their child's education in particular violates P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973.

Kruse v. Campbell, 434 U.S. 808 (1977), 431 F. Supp. 180 (1977)

The plaintiffs alleged that the Virginia Welfare Department denied a free appropriate education to poor handicapped children when an appropriate education was not available in the public schools. The Welfare Department required the parents of these children to relinquish custody of the children before it would provide full funding for an appropriate private education. The complaint alleged that this practice violated Section 504 of the Rehabilitation Act of 1973, inter alia, and that under Section 504 the parents should be reimbursed the entire amount of the private education.

The lower court noted that even though P.L. 94-142 is not intended for full implementation until September 1, 1978 "it in no way impairs or diminishes the present right of the handicapped to an appropriate education under Section 504." The intent of P.L. 94-142 is to reenforce the present right to an education. The Court felt that the implementation of P.L. 94-142 would

relieve many of the plaintiffs' complaints. Despite the Court's references to P.L. 94-142 and Section 504, it relied on the Constitution to decide that the plaintiffs had been denied equal protection.

The Supreme Court applied the reasoning that cases should not be decided on a constitutional basis if there is an appropriate statute upon which to base the decision and sent the case back to the lower court to be decided anew on the basis of Section 504. The district court recently dismissed the case on the grounds that there is no right to education cause of action under Section 504 until September 1, 1978.

The dismissal was appealed to the fourth circuit. Meanwhile the Virginia legislature enacted a new law for the education of the handicapped that will put them in compliance with P.L. 94-142. Virginia will provide free appropriate education as of September 1, 1978. The plaintiffs consequently dropped the appeal.

Kopsco v. Riles (formerly Crowder v. Riles), CA 000384 (Sup. Ct. Los Angeles County, 1977)

This class action sought appropriate free public education for handicapped children or payment for placement in appropriate private schools. California provided funds to reimburse parents for the cost of sending children to private schools when appropriate public education was not available. The funds available, however, were not sufficient to cover full cost of the private education. It was alleged that none of the plaintiffs were receiving an appropriate education and that the funding scheme violated Section 504 of the Rehabilitation Act of 1973, P.L. 94-142, inter alia. The Court decided that the funding scheme violated California's equal protection clause and, therefore, did not reach the question of the alleged Section 504 or P.L. 94-142 violations. The state is now obligated to provide the full tuition, transportation and maintenance costs of private placement when there is no appropriate public education available.

For further information contact Terry Friedman, Western Center on Law and Poverty, 3535 West 6th St., Los Angeles, California 90020 (213) 487-7211

Due Process Procedures

Howard S. v. Friendswood Independent School District, G-78-92 (S.D. Texas, filed May 18, 1978)

The plaintiff is a learning disabled and emotionally handicapped student. It is alleged that as a direct result of his inappropriate educational placement he had prolonged and excessive absences from the classroom which led to his expulsion. The plaintiff was given no notice nor a hearing when he was expelled. The plaintiff on the advice of a private physician is currently in a residence which meets his special education needs at a cost of $2000 per month. The plaintiff is seeking the impartial due process hearing that he is entitled to under P.L. 94-142 and that the defendant develop such procedures along with comprehensive evaluation procedures. The plaintiff additionally alleges that his rights under Section 504 of the Rehabilitation Act of 1973 have been violated.

On June 21, 1978 the Court ordered a preliminary injunction. The defendants must initiate an immediate and comprehensive evaluation of the plaintiff and determine his special education needs. They must develop an IEP and provide the plaintiff with appropriate educational services. In the meantime the plaintiff will remain at his private placement and the defendants will assume the cost.

For further information contact J. Patrict Wiseman, Pape & Mallet, 1929 Allen Parkway, Suite 600, Houston, Texas 77019 (713) 526-1778

Miller v. La Habra School District, C233-358 (Sup. Ct. Los Angeles County, filed March 1978)

At issue in Miller was the right of a handicapped child to remain in his present educational program while a due process hearing to determine the appropriate placement is pending. The plaintiff, a high level quadraplegic on a respirator full time, was excluded from the regular classroom by the assistant superintendant of the school district without a hearing. The plaintiff demanded a hearing and requested to be put back in the regular classroom during the pendancy of that hearing. The hearing was granted but the plaintiff's request to be returned to the regular classroom was denied. The plaintiff sought a writ of mandate to be allowed to return to the regular classroom while the hearing was pending. A stipulated ruling allowed his return to the regular classroom. At the due process hearing it was determined that the regular classroom was the appropriate placement for the plaintiff.

For further information contact Western Law Center for the Handicapped, 849 So. Broadway, Suite 206, Los Angeles, California 90014 (213) 972-0061

Smith v. Cumberland School Committee (formerly Smith v. Curtain), CA No. 76-0510 (D.R.I., filed 1976)

The plaintiff is a multi-handicapped child who is in need of special education and related services. In December 1975 he was placed in a program appropriate for his needs by the defendant and the defendant undertook the funding of the program. The defendant refused to continue to fund the plaintiff's program for the academic year 1976-77 on the grounds that the plaintiff's classification as an "emotionally disturbed" child made his education and care the responsibility of the Department of Mental Health, Retardation and Hospitals (MHRH) according to state law. In December 1976 a preliminary injunction was issued which prevents the defendant from terminating funds until the termination of the administrative proceedings and any appeals taken therefrom.

In January 1977 a hearing was conducted before the school committee (named defendants) to determine which agency was responsible for the plaintiff's education. The committee decided the MHRH should be responsible. The plaintiff appealed this decision to the Commissioner of Education of Rhode Island and was heard by the Associate Commissioner. The Associate Commissioner was asked to remove himself from the hearing because he was not an impartial hearing officer. He refused to do so. He also agreed with the defendants that MHRH is responsible.

The Associate Commissioner's decision is currently being appealed in the U.S. district court of Rhode Island. The complaint is based, inter alia, on P.L. 94-142. The plaintiff seeks a declaratory judgment that the state regulations do not comply with P.L. 94-142 due process procedures, an

prohibitory injunction to prevent the Commissioner and Associate Commissioner from conducting hearings until such time when the state regulations will be in compliance with the federal law, a review and reversal of the final decision of the SEA, a declaratory judgment that the LEA (defendants) and not the MHRH is responsible for providing the plaintiff with a free appropriate education and a mandatory injunction against the defendants requiring them to fund the plaintiff's education. The School Committee has yet to answer this complaint.

For further information contact George M. Prescot, Oster, Groff & Prescot, 936 Smithfield Ave., Lincoln, Rhode Island 02865 (401) 724-2400

Discipline/Expulsion

Stuart v. Nappi, 433 F. Supp. 1235 (D.Conn., 1978)

The plaintiff is a student with severe learning and emotional disabilities who was involved in a disruptive incident at school. A written request for a review of the plaintiff's special education program was lodged with the defendant before the scheduled disciplinary hearing which would determine whether or not to expel the plaintiff.

The Court granted a preliminary injunction to prevent the expulsion hearing from taking place. In that decision the Court held that P.L. 94-142 entitles school authorities to take swift disciplinary measures against disruptive handicapped children such as suspension. The child's placement, however, can only be changed through a review of the child's special education program and a determination of whether a child's present placement is appropriate. The Court noted that expulsion contradicts P.L. 94-142's mandate that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. The Court also held that P.L. 94-142 authorizes the federal courts to hear all claims of noncompliance with P.L. 94-142's procedural safeguards, regardless of the amount in controversy. Currently, the certification of this suit as a class action is pending.

Lopez v. Salida School District, C.A. No. C-73078 (Dist. Ct. County of Denver, Colorodo, January 20, 1978)

The plaintiff has learning and behavioral problems and requires special education. He was expelled without notice or a hearing from high school in 1974 for disruptive behavior. Despite his attempts for readmission the plaintiff was denied an education for three years. This action was filed in June 1977 and a consent decree was entered on January 20, 1978. The defendant agreed to provide compensatory education which the plaintiff is currently receiving at a community college. The defendant is paying the cost of the education including individualized instruction and counseling plus the cost of room and board. The school district will be bound to this through academic year 1978-79, even though the plaintiff will be 21 in 1978. The complaint was based in part on Section 504 of the Rehabilitation Act of 1973.

For further information contact Norman Anderson (303) 589-4993

Kennth J. v. Kline, No. 77-2257 (E.D.Pa., filed June 28, 1977)

The plaintiff is emotionally disturbed and was expelled from school for his participation in a disruptive incident. The expulsion was not treated as a change in placement. The plaintiff sought appropriate placement and wanted all proposed suspensions and expulsions to be treated as placement changes. The plaintiff also alleged that under Section 504 of the Rehabilitation Act of 1973 a due process hearing must be started when it becomes clear that the placement is not appropriate. The complaint was based on P.L. 94-142 and Section 504, inter alia.

The parties have entered a stipulation agreement. The defendant adopted the suspension/expulsion procedures sought by the plaintiff and promulgated regulations for these procedures as reported in the Saturday April 15, 1978 Pennsylvania Bulletin on page 1102. They will be codified at 22 Pa.Code 341.90.

For further information contact Education Law Center, 2100 Lewis Tower Building, 225 South 15th St., Philadelphia, Pennsylvania 19102 (215) 732-6655

Donnie R. v. Wood, No. 77-1360 (D.S.C.,1977)

The plaintiff was expelled without written notice or a hearing for starting a fight. A hearing was held three weeks later where it was decided to permanently expel the plaintiff despite expert testimony that it was not necessary. The plaintiff received no education program for four months when three hours a week of home instruction was arranged.

The plaintiff allegd that his rights were violated under Section 504 of the Rehabilitation Act of 1973. On August 22, 1977 (almost a year after the plaintiff had been expelled) the parties entered a consent decree for an immediate education evaluation and provision of appropriate educational services within the public school to the greatest extent possible.

Davis v. Wynne, No. CV-176-44 (S.D.Ga., filed March 23, 1976)

The plaintiff was a 17-year-old diagnosed EMR student who was placed in the regular classroom. He was expelled from school for disruptive behavior. The complaint was based on Section 504 of the Rehabilitation Act of 1973, inter alia, and alleged that the defendants had failed to provide the plaintiff with appropriate education. The plaintiff sought an order that required the defendants to provide appropriate placement. The action was settled out of court when the school board agreed to provide funds for transportation and education of the plaintiff at an appropriate school.

Exhaustion of Administrative Remedies

Sherer v. Maier, No. 77-0594-CV-W-4 (W.D.Mo., 1977)

The plaintiff alleged that her rights under Section 504 of the Rehabilitation Act of 1973 were violated because the defendant refused to provide catheteria-

zation. The case was dismissed without prejudice. The plaintiff must exhaust administrative remedies.

According to "Section 504 Compliance Report" July 1978, the plaintiff has recently filed suit under P.L. 94-142 requesting that the defendants provide a free appropriate education in the least restrictive environment. The plaintiff wants a court order for the termination of federal funds until the provision of appropriate education.

For further information consult Section 504 Compliance Report, published Kemp and Young, Inc., 6700 Squibb Road, Mission, Kansas 66202.

Sussan v. East Brunswick Board of Education, No. C-4232-76 (N.J., 1977)

The plaintiff's father wants the LEA to pay for the rooming costs of his son in accordance with Section 504 of the Rehabilitation Act of 1973. The complaint was dismissed on February 22, 1978 because the state demonstrated that it was in the process of developing programs so that it would be in compliance with the federal regulations. One program was the creation of a special administrative review to determine which children in private residential programs are entitled to have the full cost of their programs paid by public agencies. The father's request is currently undergoing administrative review.

For further information contact Education Law Center, Suite 800, 605 Broad Street, Newark, New Jersey 07102 (201) 624-1815

Miscellaneous Cases Decided Under P.L. 94-142 and Section 504

Stemple v. Board of Education Maryland
Woorel v. Board of Education Maryland

Both these cases were recently filed and the complaints were bases on P.L. 94-142. Woorel was dismissed and Stemple is still pending in federal court.

For further information contact Developmental Disability Law Clinic, 500 W. Baltimore Street, Baltimore, MD 21201

McLeod v. Rice, CV-78-13-BU (D.Mont., April 20, 1978)

The plaintiff, a mentally retarded child, was in a program for trainable mentally retarded children in her home district in accordance with her IEP. In February 1978 the plaintiff's parents filed suit pursuant to P.L. 94-142 seeking a court order for the the defendants to provide an evaluation and residential placement in a Pennsylvania facility.

The Court ordered that the parties make application for evaluation to an Oregon facility which the defendants had suggested to the plaintiff's parents prior to the filing of this action. The Court ruled that placement in the Pennsylvania facility was inappropriate before an independent evaluation was completed.

Kampmeier v. Nyquist, 553 F. 2d 296 (2d Cir., 1977)

The plaintiffs, both junior high school students without sight in one eye, were excluded from participation in contact sports because of their alleged handicaps. They sought a preliminary injunction which was denied. The Court held that when there is a substantial justification for the schools's policy,

Section 504 of the Rehabilitation Act of 1973 does not mandate a preliminary injunction unless the plaintiffs can make a clear showing of probable success on the merits.

Kampmeier v. Harris, No. 76-7383 (Sup. Ct. N.Y., February 17, 1978)

The facts are the same as Kampmeier v. Nyquist, supra. The Court held that a physically impaired child could not be excluded from participation in contact sports otherwise available under the school system's physical education program unless there was a valid determination in accordance with P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973 that the student is handicapped and is in need of special education and related services.

Eberle v. Board of Education Pittsburg, 444 F. Supp. 41 (D.Pa., 1977)

The plaintiff is hearing impaired. The plaintiff was attending a private school but the defendant wanted him transfered to a public school. There was a due process hearing contesting the transfer, but the transfer was upheld. The Court held that Section 615 of P.L. 94-142 did not become binding on the states until October 1977 and, therefore, the Court had no jurisdiction to hear cases stemming from claims before that date. This Court also noted that "the main purpose of the Act (P.L. 94-142) is funding of special schools for the handicapped."

Cases that Pose Future P.L.94-142 and Section 504 Issues

Kremens v. Bartley, 402 F. Supp. 1039 (1975)
Parham v. J.L. & J.R., 412 F. Supp. 112 (1976) No. 75-1690 (Supreme Court docket)
Secretary of Public Welfare v. Institution of Juveniles, No. 77-1715 (Supreme Court docket)

Secretary of Public Welfare (formerly Kremens) and Parham will be argued before the Supreme Court next term. The main issues in each case are the extent of a child's right not to be institutionalized by his parents and what procedural safeguards attach to that right.

In Kremens the lower court ruled that voluntary institutionalization denies the child due process. The Court held that the plaintiffs were entitled to a probable cause hearing within 72 hours after the date of initial detention. After a set time for adjustment the child was entitled to a second hearing to determine whether the placement is appropriate. At the second hearing the child is entitled to written notice, counsel, be present, confront and cross examine witnesses, and present his own evidence. Kremens was before the Supreme Court before but was vacated and remanded on mootness grounds because the appellees were no longer affected by the statute they were contesting. Consequently, there are new plaintiffs in Secretary of Public Welfare who are currently affected by the statute. The substitution of these plaintiffs for those in Kremens erases the mootness argument and makes the case reviewable by the Supreme Court.

In Parham the Court held that voluntary placement of a child by its parent in an institution violates due process. The Court ordered the state to locate the most appropriate non-hospital placement for the plaintiffs.

TASK v. Santa Anna School District
CARC v. Compton Unified School District

As a result of Proposition 13, most if not all of California's summer school programs were shut down as a money saving device. These actions were filed alleging that failure to provide summer school programs to the handicapped violated the California State Budget Act, P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973. The mere filing of these actions was sufficient to persuade the defendants to provide summer school programs for summer 1978. The plaintiffs have voluntarily dismissed the actions.

For further information contact Terry Friedman, Western Center on Law and Poverty, 3535 West 6th St. Los Angeles, California 90020 (213) 487-7211

Yarber v. Riles, C126040 (Sup. Ct. Riverside County, 1978)

At issue in Yarber was the defendant's obligation to provide a summer school program for the plaintiff. Apparently the plaintiff's IEP was vague, but there was an alleged understanding that the defendant would continue to provide a summer school program for the plaintiff as it had in years past. This action was settled the day before the scheduled hearing for a writ of mandate when the defendant agreed to provide a summer school program. Nevertheless, this case raises many issues about IEP formation, due process procedures, and provision of 12 month programs which most probably will be addressed in future litigation.

For further information contact Daniel J. Fagan, 3783 Tibbetts St., Riverside, California 92506 (714) 682-2531

Cases to Note

Kurtis v. Pasadena Board of Education, C22-7-256 (Sup. Ct. Los Angeles County, filed January 1978)

The plaintiff alleges that the defendant is in violation of Section 504 of the Rehabilitation Act of 1973 when it meets in buildings that are not accessible to the handicapped. The Judge has orally acknowledged that the plaintiffs are entitled to a writ of mandate and currently the exact wording of the mandate is being perfected.

For further information contactWestern Law Center for the Handicapped, 849 So. Braodway, Suite 206, Los Angeles, California 90014 (213) 972-0061

Camenisch v. University of Texas, No. A-78CA-061

The plaintiff is a deaf person attending graduate classes at the defendant institution as a prerequisite to maintaining his current employment. The plaintiff, basing his complaint on Section 504 of the Rehabilitation Act of 1973, sought a preliminary injunction to force the defendant to provide interpretation services. A preliminary injunction was issued but the plaintiff was required to post a security bond of $3000 pending the outcome of the litigation.

Then the Court ordered the action stayed, pending a final administrative determination on the merits and the plaintiff was ordered to immediately file a complaint with HEW seeking the desired relief.

For further information National Center for Law and the Deaf. 7th St. and Florida Ave. N.E., Washington, D.C. 20002 (202) 447-0445

Davis v. Southeastern Community College, No. 77-1237 (4th Cir. 1978), 424 F. Supp. 1341 (1976)

The plaintiff is a hearing disabled person and a licensed practical nurse who applied to the defendant institution's Associate Degree Nursing program. The plaintiff alleged that she was denied admission because of her handicap and, therefore, her rights were violated under Section 504 of the Rehabilitation Act of 1973, inter alia. The Court ruled that she did not have to exhaust further administrative remedies as a precondition to this action and that there was no Section 504 violation because that plaintiff's handicapping condition prevented her from being otherwise qualified to participate in the program.

On appeal the Court sent this action back to the district court ordering that court to makes its determination of otherwise qualified not on the basis of the plaintiff's handicap but on the basis of her academic and technical qualifications for admission to the program. The appellate court also ruled that the plaintiff had a private right of action under Section 504 and that she did not have to exhaust administrative remedies which would prove futile.

For further information contact Sy Dubow, National Center for Law and the Deaf, 7th St. and Florida Ave. N.E., Washington, D.C. 20002 (202) 447-0445

Crawford v. University of North Carolina, 440 F. Supp. 1047 (1977)

The plaintiff is a deaf person who was attending graduate courses at the defendant institution. The defendant denied the plaintiff interpreter services and the plaintiff alleged that his rights under Section 504 of the Rehabilitation Act of 1973 were violated. The Court ordered a preliminary injunction so that the defendant would provide interpreter services to the plaintiff for the academic year 1977-78. The relief was conditioned on the plaintiff posting a bond of $3000 bond. The relief was also conditioned on the plaintiff immediately initiating a complaint with HEW requesting the desired relief. The plaintiff was also ordered to consider bringing the Secretary of HEW into the action as a party or amicus.

For further information contact Sy Dubow, National Center for Law and the Deaf, 7th St. and Florida Ave, N.E., Washington, D.C. 20002 (202) 447-0445

Barnes v. Converse College, 436 F. Supp. 635 (1977)

The plaintiff was admitted to the defendant's summer program where she intended to earn graduate credits which were necessary for her to maintain her "out-of-field" permit to teach in public schools in South Carolina. The plaintiff is deaf and requires an interpreter to participate in classroom activities. The plaintiff bases her complaint on Section 504 of the Rehabili-

tation Act of 1973.

A preliminary injunction was granted in July 1977 and the defendant was ordered to provide an interpreter at no extra cost to the deaf student. In April 1978 a final decision was issued. The Judge dissolved the preliminary injunction and ruled that she should have exhausted all administrative remedies. This decision is currently being appealed to the fourth circuit.

For further information contact Sy Dubow, National Center for Law and the Deaf, 7th St. and Florida Ave. N.E., Washington, D.C. 20002 (202) 447-0445

Levy v. City of New York, 429 U.S. 805 (1976), 38 N.Y. 2d 653 (1976)

Levy challenged the New York Family Court Act which provides tuition, transportation and maintenance costs for the education of blind and deaf children but only tuition and transportation costs for the education of children with other handicaps in a residential setting. The Supreme Court let stand the decision of the State of New York Court of Appeals that the Family Court Act is constitutional.

Cuyahoga County Association for Retarded Citizens v. Essex, 411 F. Supp. 46 (1976)

Cuyahoga challenged an Ohio statute which excluded from free and mandatory public education all children who have been found incapable of profiting substantially from further instruction. The Court acknowledged that education has not been given the status of a fundamental right and accordingly the Court would only apply the "rational basis" test to determine the constitutionality of the statute. "In order to invalidate a classification under the 'rational basis' test it must be shown that it is arbitrary, does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation or that no state of facts exists which would reasonably support a legitimate state interest therein." The Court found that the classification in the statute was not arbitrary and, therefore, that the statute was constitutional. The Court further noted, however, that most of the issues presented in Cuyahoga would be mooted by Ohio's participation in P.L. 94-142.

Fialkowski v. Shapp, 405 F. Supp. 946 (1975)

The plaintiffs claimed that the LEA denied them equal protection by failing to provide an appropriate education. The Court while ruling on motions to dismiss the complaint reached the conclusion that there is a constitutional right to a certain minimum level of education and indicated that mentally retarded children may constitute a suspect class deserving strict judicial scrutiny to determine whether they are receiving equal protection under the law.